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In the Matter of :

Florida Department of Labor and
Employment Security
Complainant, :

v. :

U.S. Department of Labor
Respondent
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Case No. 1999-JTP-16
Date Issued AUG - 7 2000

**ORDER WITH RESPECT TO THE ASSERTION OF PRIVILEGES
AND GRANTING TIME TO FILE
EVIDENCE AND BRIEFS**

On June 28, 1999, Grant Officer Jaime G. Salgado, Employment and Training Administration, U.S. Department of Labor (DOL), issued a Final Determination under the Job Training and Partnership Act (JTPA), questioning \$11,419,499 in JTPA Title III costs as misapplied by the Florida Department of Labor and Employment Security (FDLES) in its administration of its performance based incentive program. On July 26, 1999, the FDLES requested a hearing on all adverse issues and findings set forth in the Final Determination. FDLES now pursues a Motion to Compel production of all audit working papers and any other correspondence related to the audit of Florida's JTPA Title III program by DOL's Inspector General (IG). 29 C.F.R. § 18. 21. In response, DOL opposes the motion and seeks a protective order. 29 C.F.R. § 18.15(a)(4).

Although Respondent has produced 38 volumes of documents, 36 of which Complainant has copied, DOL claims privilege and withheld as privileged four documents, 24 pages of supervisory notes, and six electronic drafts of the audit report which it claims variously fall within four document categories including project proposals, quality control, administrative, and drafts which are not subject to discovery.

Before asserting its various privilege claims, DOL contends that Complainant's Motion to Compel initially fails to meet the content requirements of 29 C.F.R. § 18.21(b) (3) which states: "The motion shall set forth: ...(3) Arguments in supports of the motion." In DOL's view, FDLES's arguments are inadequate. It is accurate to categorize FDLES's arguments as abbreviated. In support of its

motion, Complainant argues that it is "defending an \$11,000,000 million dollar audit exception, and an adequate defense of the claims requires the Complainant to be able to review all the papers and documents that were generated by the OIG and were related to the adverse findings." While lacking in detail, this reasoning is sufficient to warrant review of FDLES's motion and the various privileges DOL asserts.

Privilege Claims

Respondent has identified the documents it has withheld and has specified the privilege or privileges which it believes attaches to each document. These are set forth below, seriatim:

1. A four page "Project Proposal 1997" withheld as subject to the deliberative process and confidential informant's privileges;
2. A seven page report by an independent reviewer of the IG's audit withheld as subject to the deliberative process and self-evaluative privileges;
3. Twenty-four pages of supervisory notes of the audit work papers by the auditor in charge of the project withheld as subject to deliberative process and self-evaluative privileges;
4. Management Review Letters withheld as beyond the scope of the request for production;
5. A six page draft summary of the audit findings withheld as subject to the deliberative process privilege; and
6. Six electronic early drafts of the audit report withheld as subject to the deliberative process privilege.

Initially, three procedural requirements must be satisfied when the government refuses to produce documents in discovery by invoking the deliberative process and informant's privileges, and by analogy to the application of these two privileges, the evolving, and less well known, "self-evaluative privilege," assuming the latter is cognizable in these proceedings.¹ Thus, the head of the agency or a high ranking subordinate with proper delegation must personally review the subject material and invoke the privilege. In addition, the assertion of the privilege must specifically describe the material covered, and

¹ The FOIA does not expand or contract existing privileges or create new privileges. It does, however, incorporate virtually all civil discovery privileges, and thus evolves as new privileges are recognized by the courts. *See, U.S. v. Weber Aircraft Corp.* 465 U.S. 792, 799-800 (1984). I am aware of no administrative decision within the Department of Labor, by an Administrative Law Judge, the Board of Contract Appeals, the Administrative Review Board, or decision of the Secretary which has applied the "self-evaluative privilege;" however, it is not unknown, although rarely applied by the courts.

finally, the reason for preserving the confidentiality of the requested documents must be articulated. *See, Coastal States Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980); *Charlesgate Constr. Co., DOL Board of Contract Appeals*, No. 96 BCA 2, 1997, DOLBCA LEXIS 2 at *7-8 (March 7, 1997).

The affidavit filed by the Acting Inspector General, satisfies these criteria. She has invoked the privileges as head of the Office of Inspector General based upon the requisite personal review and consideration. In addition, the Acting Inspector General has specifically identified and described covered documents and explained, with particularity, the reason each should remain confidential.

Thus, the information for which a protective order is sought is, with the exceptions discussed below, predecisional in nature generated as part of a continuing process of agency decisionmaking. Such material is generally regarded as privileged communications in the chain of the deliberative process. *See, Mapother v. Dept of Justice*, 3 F.3d 1533 (D.C. Cir. 1993); *Jordan v. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978); *NLRB v. Sears. Roebuck & Co.*, 421 U.S. 132, 151 (1975). The privileges, however, must be applied with particularity based upon the specific justifications proffered in response to each specification in the Motion to Compel. The documents FDLES seeks are considered below, seriatim.

1.

FDLES demands production of Project Proposal 1997. This four page document anticipates an audit of FDLES' discretionary expenditures of JPTA Title III funds. It contains "allegations received by OIG...subjective impressions of the Florida programthe manner and means by which the OIG could conduct an audit, the project time and cost, and ... possible scope of findings" The Acting IG describes this report as "very preliminary" and typical of the type of report audit managers use to decide what audits to perform. This document is predecisional and deliberative in nature, and, in addition, contains, the identity or details which could lead to the identification of informants who communicated with the IG.

I am mindful that FDLES requests *in camera* inspection of the documents for which the IG seeks a protective order, and *in camera* inspection is clearly contemplated by 29 C.F.R §§ 18.15(a)(5), and 18.46, and the FOIA, 5 U.S.C. 552(a)(4)(b). Nevertheless, *in camera* inspection is a matter committed to the "broad discretion of the trial judge," *See, Spirko v. U. S. Postal Service*, 147 F.3d 992 (D.C. Cir. 1998); *Halpern v. FBI*, 181 F. 3d 279 (2nd Cir. 1999), and the courts use it in exceptional rather than routine cases. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *PHE. Inc. v. U. S. Dept. of Justice*, 725 F.2d 248 (D.C. Cir. 1993); *Animal League Defense Fund v. Dept. of Air Force*, 44 F.Supp. 2d 295 (D.D.C., 1999). In general, *in camera* inspection is unnecessary in the absence of any indication of bad faith, *Ligornier v. Reno*, 2 F.Supp. 2d 400, 405 (S.D.N.Y. 1998); *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996), under circumstances in which the supporting affidavit is sufficiently detailed to enable the trier of fact to render a *de novo* determination regarding the applicability of the privilege. *Compare, McNamera v. U.S. Dept. of Justice*, 974 F.Supp. 946, 955 (W.D. Texas), with *PHE. Inc.*, *supra* at 252-253. Thus, *in camera* review is not invoked merely on the theory that "it can't hurt." *Ray v. Turner*, 587 F.2d 1187, 1195

(D.C. Cir. 1978). With respect to Project Proposal 1997, the IG's affidavit is sufficiently detailed to permit a determination that the deliberative process privilege appropriately applies to this planning document.

2.

FDLES seeks production of a seven page report from Jim Woodward to Robert Wallace. The IG's affidavit explains that the General Accounting Office and internal OIG procedures require independent review of audits prior to issuance. Woodward prepared an undated seven page report to Wallace which the Acting, IG describes "apparently prepared in order to evidence the independent review" of the Florida audit. Generally, reports by experts who will not be called to testify are not routinely discoverable in civil proceedings. Fed. Rule 26 (b)(4); *see, Hoover v. Dept. of Interior*, 611 F.2d 1132, 1141(5th Cir. 1980); *Chemical Mfrs. Assoc. v. Consumer Product Safety Comm.*, 600 F. Supp. 114, 118-119 (D.D.C. 1984). The privileges asserted here, however, are based upon the deliberative and "self-evaluative" nature of this information, not the expert materials it contains.

Research reveals that the deliberative process privilege has been sustained under circumstances in which a third-party communication "is necessary to ensure efficient governmental operations..." *U.S. v. Weber Aircraft Corp.* *supra* at 465 U.S. at 802. As a predecisional document, the Woodward report would fall within this category. The Acting IG's affidavit explains that independent review ensures compliance by the OIG with proper audit standards, and this process clearly promotes governmental efficiency in the public interest.

Moreover, the process by which the government seeks independent review of its audit reports is itself inherently self-evaluative in nature, and to the extent a self-evaluative privilege exists as recognized by many courts, (*See, Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970); *Morgan v. Union Pacific Railroad Co.*, 182 F.R.D. 261 (N.D.III. 1998); *Resnick v. American Dental Assoc.*, 95 F.R.D.372 (N.D.III. 1982); *O'Conner v. Chrysler Corp.*, 86 F.R.D. 211(D. Mass. 1980); *Sheppard v. Consolidated Edison Co.*, 89 F.Supp.6 (E.D.N.Y. 1995); *Reichhold Chemicals v. Textron, Inc.*, 157 F.R.D. 522(N.D. Fla. 1994), and *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992)), the Woodward report would qualify for coverage.

Yet, DOL recognizes that both the deliberative process and self-evaluative privileges are limited, conditional, and unavailable as a shield for objective data or straight factual reporting. In this respect, the affidavit is not sufficiently detailed in asserting, either the deliberative process or self-evaluative privilege to allow me to ascertain whether the Woodward document contains selective fact reporting which may reflect any exercise in judgment.

Nor does the affidavit establish the predecisional nature of the document. As an office which specializes in pursuing audit tracks, OIG must surely appreciate the importance of date documentation in determining any time sequence of events. In the absence of dated documentation or other evidence of the temporal relationship, it cannot be established that Woodward's report is predecisional to the final audit issued in this matter. An affidavit by Woodward, or Wallace, or some other evidence indicating the temporal relationship of this document to the final audit report will be necessary to determine

whether it is predecisional in nature, and in camera review will be necessary to ascertain whether it contains discoverable factual content.²

3.

The same privileges are asserted for twenty-four pages of undated supervisory review notes. As the affidavit attests, such notes are "normally" prepared by the auditor in charge of the project, reflect supervisory review to ensure that reports comply with government accounting standards, and "typically" are prepared prior to the final audit. Often they result in changes in the report or workpapers.

Here again, however, the absence of dates prevented the IG from definitively representing these particular notes as predecisional. While such notes typically precede the final report, these particular notes may or may not, and, in fact, could reflect comments on the final audit report. Thus, the affidavit describes "typical" or "normal" procedure involving the preparation of notes of this type, but does not directly attest to the predecisional nature of these documents. Whether the notes are contained on drafts of the audit report or appear in separate documents is not clear on this record. Consequently, additional evidence is needed which places these notes in their proper temporal context before the applicability of the asserted privileges can be determined.

4.

The affidavit asserts that a May 1, 1994, internal audit notice entitled "Management Review Letters" was not the basis of any finding or recommendation in the audit report, and thus is not responsive to FDLES' request for discovery, and FDLES does not contend otherwise. It, therefore, need not further be considered here.

5.

Finally, the Department claims a deliberative process privilege for a draft six page summary of a preliminary summary of the audit findings, and six early electronic drafts of the audit report. Although "drafts" constitute a category of documents which are likely covered by a privilege in discovery and by Exemption 5 in FOIA litigation, (*See, City of Virginia Beach v. Dept. of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993); *Town of Norfolk v. U.S. Corp of Engineers*, 968 F.2d 1438, 1458 (1st Cir.

² While the self-evaluative privilege would not necessarily be confined to predecisional situations in all cases, and has been applied after the fact, for example, to cover peer review of allegations of past malpractice, (*See, Bredice v. Doctor's Hospital, supra*), in this instance, DOL asserts the self-evaluation process as part of its predecisional "quality controls." Thus, in both instances in which it claims the privilege here, self-evaluation in preparation for the final audit report was allegedly performed to ensure compliance with government audit standards onto derive the benefit of supervisory review. Yet, by invoking the policy considerations related to its predecisional quality control as justification for the self-evaluative privilege, it was incumbent that DOL establish that the documents for which it claimed the privilege were actually predecisional in nature.

1992); Dudman Communications Corp. v. Dept. of Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987); Russell v. Dept. of Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982)), the designation of "draft" does not automatically end the inquiry. Lee v. FDIC, 923 F. Supp. 451, 458 (S.D.N.Y. 1996). Although the courts have not insisted that an agency demonstrate how drafts differ from the final version of a document, (See, Mobil Oil Corp. v. EPA, 879 F.2d 698 (9th Cir. 1989), City of W. Chicago v. NRC, 547 F. Supp. 740 (N.D. 111. 1982), Lead Indus., 610 F.2d at 85), (fact summaries), in this instance, the IG attests that each draft is different from the final version. Under such circumstances, the courts have sustained the deliberative process privilege, noting that a comparison of the draft versions with the final product would reveal the evolution of thought processes and the policy judgments of the decisionmakers. This, of course, is precisely the sort of information the deliberative process privilege is designed to shield. See, National Wildlife Fed'n v. U.S. Forest Service, 861 F.2d 1114, 1120-1122 (9th Cir. 1998); Marzen v. HHS, 825 F.2d 1148, 1155 (7th Cir. 1987); AFGE v. HHS, 63 F. Supp. 2d 104, 109 (D. Mass. 1999). I conclude that the findings draft and the electronic drafts of the audit report constitute privileged communications in this proceeding.

For all of the foregoing reasons, I conclude that the Project Proposal 1997 report, the six page summary of draft findings, and six electronic drafts of audit report are privileged communications, and that the Management Review Letters are non-responsive. I further conclude that additional evidence is needed to establish the temporal context of the Woodward report and the supervisory notes, and that, in addition, the Woodward report, even if privileged, must be submitted for *in camera* review to determine whether it contains discoverable factual content.

Although certain documents specified above are privileged and further inquiry is necessary to adjudicate the application of any privilege to the others, a balancing test still need be applied which weighs the interests of the government in keeping the material confidential against the interests of the other party in obtaining access to the information. Green Peace v. National Processors Association, 2000 WL 433238 (W.D. Wash. 2000). Thus, a party seeking discovery may overcome the self-evaluative and deliberative process privilege by demonstrating a compelling need for the documents being withheld. U.S. v. Rozet, 183 F.R.D. 662, 665 (N.D. CA. 1998). In this respect, FDLES' general assertion that the material may aid it in its defense of its expenditures is not sufficiently specific to justify disclosure of privileged information. Accordingly, while the Department will be afforded an opportunity to demonstrate the sequence of its decisionmaking process, FDLES will be afforded a further opportunity to demonstrate its compelling need for discovery of privileged information in this proceeding. Therefore:

ORDER

IT IS ORDERED that the Department of Labor, within fifteen days of the date hereof, submit such affidavits or other evidence which demonstrates the temporal context of the Woodward report and the twenty-four pages of supervisory notes in relation to the final audit report, and in addition submit the Woodward report for *in camera* inspection; .

IT IS FURTHER ORDERED that FDLES be afforded an opportunity to submit within thirty days of the date hereof a brief commenting upon any evidence submitted by the Department in

response to the first paragraph of this order, and demonstrating with particularity FDLES' need for information deemed privileged in this proceeding.

STUART A. LEVIN
Administrative Law Judge